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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 346

HARRY B. HELMSLEY,
Petitioner,
v.
CITY OF DETROIT and CHARLES N. WILLIAMS;
and
COUNTY OF WAYNE and LOUIS H. FUNK,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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WO. 2-8745—WO. 2-8732

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Harry B. Helmsley, your Petitioner, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Sixth Circuit was entered on June 29, 1967, and is not officially reported. The majority opinion is set forth in Appendix A, *infra*, p. 17. The dissenting opinion is set forth in Appendix A, *infra*, p. 25. The Findings of Fact and Conclusions of Law constituting the opinion of the United States District Court for the Eastern District of Michigan, Southern Division are not officially reported and are set forth in the Appendix for Appellant filed in the United States Court of Appeals (327a-343a).*

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on June 29, 1967 (Appendix A, *infra*, p. 28). The jurisdiction of this Court is invoked under 28 U.S. Code 1254(1).

QUESTION PRESENTED

The Michigan constitution provides that the assessment of all real and personal property for ad valorem taxes shall be uniform and at cash value. The statute defines cash value as the price which could be obtained for property at private sale and not at forced or auction sale, i.e., market value. Assessment of Detroit, Michigan, properties, generally, is at the level of not more than 50% of market value.

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* Figure with letter "a" denotes page of said Appendix for Appellant.

The question is whether assessment for ad valorem taxation of a parcel of real property in Detroit, during 4 successive years, in amount many times greater than its market value, is valid under Michigan law, as well as not in violation of the equal protection clause of the Fourteenth Amendment.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The following constitutional provisions and statute are set forth in Appendix B, *infra*, p. 29: Section 1 of the Fourteenth Amendment of the Constitution of the United States; Article X, Sections 3 and 7 of the Michigan Constitution of 1908; Section 211.27, Compiled Laws of Michigan of 1948, M.S.A. Section 7.27.

STATEMENT OF THE CASE

Petitioner, a citizen and resident of New York, seeks review of four consolidated suits brought in the United States District Court for recovery of ad valorem taxes paid under protest to Defendant Michigan municipalities by reason of assessments imposed against his parcel of real property in Detroit for the years 1960 through 1963.[1] Judgment by the District Court of no cause for action (344a) was affirmed by the Court of Appeals (App. A, p. 24), Judge Neese dissenting (App. A, p. 25).

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[1] A detailed stipulation (251a-297a) covers the material facts of the case. The amount paid by Petitioner is $685,868.34. Recovery would be subject to reassessment by the assessing officials. *Helin v. Grosse Pointe Tp., infra.*

The basis for jurisdiction of the District Court is diversity of citizenship, with the requisite jurisdictional amount involved, and the existence of a federal question under the Fourteenth Amendment.

The property in question was built many years ago as a manufacturing plant.[2] It is no longer suitable for that purpose, and no investor would attempt to reproduce it. Manufacturing operations were discontinued in 1954, from which time on the former owner attempted to sell the property. Finally, in 1960, the property was sold to Petitioner on the open market, in an arms-length transaction, for $500,000. The property, not useful for any other purpose, is presently divided into various tenancies under professional management. Despite the stipulated fact that strenuous efforts were made to promote occupancy, there was never more than 40 per cent occupancy during the four-year period (253a). The District Court found that the expenses of operating the property exceeded income by over $1,000,000 during that period (329a-330a). More than 45 cents of every aggregate dollar of gross income has been taken by property taxes in that time.

Furthermore, it is undisputed that for each of the four years in question, the price that could have been obtained for the property at private sale would have been but a small fraction of the assessment. The market value ranges from the low estimate of $250,000—$500,000 for four years, to the maximum estimate of $600,000 for 1962 and $750,000 for 1963.

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[2] The property consists of a number of buildings of heavy construction without clear span space, built at various times commencing in 1910, aggregating about 2,000,000 square feet of floor space, superimposed on land area of only 755,400 square feet; mostly built in 1922 and earlier, the remainder in 1929, except one building containing 7,845 square feet built in 1945.

For many years the general level of assessment of real property in the City of Detroit has been at the "rate of approximately fifty per cent of estimated sales or cash value."[3] Nonetheless, Petitioner's property was assessed at many times its market value. In 1960 the property was assessed at $3,890,126. On appeal by Petitioner, the State Tax Commission appraised the property as having full value of $8,144,716 (314a-319a) and reduced the assessment to $3,532,350, on the basis that the Commission recognizes that the level of Detroit assessments is less than fifty per cent of full value (220a). In 1962, Petitioner once more appealed the assessment to the State Tax Commission, but this time the Commission appraised the property as having full value of $4,968,723 (320a-326a), a difference in appraised value of over three million dollars in a two-year period.[4] The assessment was accordingly reduced to $2,427,710 for 1962, which remained the figure for 1963.

The Commission's appraisal was the result of applying a formula, based on reproduction cost, with allowances for depreciation, obsolescence and rental vacancies. There is no claim that the assessments purport to be equivalent to or bear any relation to market value.

The Michigan Constitution provides that assessment of all property for ad valorem taxes shall be uniform and at cash value (App. B, p. 29), and the Michigan statute defines cash value as the price which can be obtained for the property at private sale and not at forced or auction sale.

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[3] Language of the City Controller in the letter "to All Financial Institutions" representing to the "financial community" that Detroit's economy is resurgent (291a-293a).

[4] In the period between said 1960 and 1962 Commission appraisals, the District Court found that there was demolition aggregating 11,790 square feet of floor space (328a), but that the Petitioner installed a space heating system in 1961 at the cost of $350,000, and other alterations and improvements costing $170,360 in 1961 and 1962 (330a-331a).

(App. B, p. 30). Petitioner claims that the said assessments of his property are constructively fraudulent, violate the uniformity requirement of the Michigan Constitution and result in discrimination in violation of the Fourteenth Amendment to the United States Constitution.

REASONS FOR GRANTING THE WRIT

The case at bar is particularly important because the Opinion of the Court of Appeals *expressly*, and not merely by implication, abrogates the standard for uniform assessment mandated by the Michigan constitution, the very foundation of equality in taxation. Consequent nullification of the Michigan constitutional rule of uniformity manifestly results in negation of fundamental principles by which the equal protection clause of the Fourteenth Amendment of the Constitution of the United States safeguards the rights of taxpayers and their property.

A. THE COURT OF APPEALS HAS DECIDED AN IMPORTANT STATE CONSTITUTIONAL QUESTION IN A WAY IN CONFLICT WITH THE STATE LAW

1. The Constitution of Michigan (1908) (App. B, p. 29) provides:

> "The Legislature shall provide by law a uniform rule of taxation, except on property paying specific taxes . . ." (Art. X, Sec. 3) "All assessments hereafter authorized shall be on property at its cash value." (Art. X, Sec. 7)[5]

[5] The Michigan Constitution of 1963 (effective January 1, 1964) contains a similar rule of uniformity.

Pursuant to the constitutional mandate, the Legislature defines cash value:

> "The words 'cash value' whenever used in this act, shall be held to mean the usual selling price at the place where the property to which the term is applied shall be at the time of assessment, being the price which could be obtained therefor at private sale, and not at forced or auction sale." (C.L. '48, Sec. 211.27; M.S.A., Sec. 7.27) (App. B, p. 30).

The fundamental Michigan rule is that the standard of cash value as thus defined is essential to assure equality in taxation:

> "By the mandate of the Constitution as above quoted, it is made the duty of the legislature to provide a uniform rule of taxation, and an essential element of that uniform rule is, that all assessments of property shall be at its cash value." *Hudson Motor Car Co. v. Detroit,* 282 Mich. 69, 79, 275 N.W. 770 (1937).

> "The purpose of the law in requiring all assessments to be on property at its cash value is to provide a standard for determining an equality of assessments." *Cleveland-Cliffs Iron Co. v. Republic Tp.,* 196 Mich. 189, 199, 163 N.W. 90 (1917).

2. As to the extent of the discretion and power of assessing officials, and the limits within which they are free from judicial restraints, the settled Michigan doctrine is stated in *Naph-sol Ref. Co. v. Muskegon Tp.,* 346 Mich. 16, 20, 77 N.W. 2d 255, 257:

> "Assessments of properties for purposes of taxation will not be disturbed by courts unless they are so at variance with undisputed facts as to be a fraud upon the taxpayer, notwithstanding courts might disagree with conclusions of assessing officers *in the exercise of their discretionary power* and adopt a different figure upon the same evidence. . . ." (Emphasis added)

The earlier declaratory judgment case of *Helmsley v. Detroit*, 320 F. 2d 476 (1963) (C.C.A. 6), was brought by Petitioner before payment of the taxes for determination by the Court of the proper amount of assessment. The Court of Appeals in reviewing Petitioner's objections to the assessment (p. 478) and the Michigan cases to determine whether there was a state remedy, quoted the above language from *Naph-sol*, and concluded that "the objections which the Plaintiff (Petitioner) makes to the assessment of the property in the case before us, if proven, would come within the definition of fraud as given in these cases." (p. 480)

3. However, in its present decision, the Court of Appeals now asserts the theory that the assessing officials are vested with the power to abandon the *legislative standard* for assessments, and to establish a *method* of valuation as the standard. The standard of the assessment thus becomes the product of the method.

There is complete unanimity that the assessment of Petitioner's property was many times the price Petitioner could have obtained for the property at private sale in all of the four years. Although conceding that "the terms of the statute might well be interpreted as Plaintiff urges if we were free to treat the question afresh," the Opinion of the Court of Appeals disposes of the undisputed fact that there is no relationship between the assessment in this case and the market value of Petitioner's property, by simply nullifying the constitutionally imposed standard. Thus: ". . . under the circumstances of the case the market approach would not result in the ascertainment of the true value of the property. . . . *the reproduction cost method of valuation offered a realistic standard to the assessors in arriving at an assessment value,* and that the

standard so used was not arbitrary, unreasonable or fraudulent. . . ." And, finally, "Once it is established that the State Tax Commission had the right to choose the reproduction cost method, most of plaintiff's case simply missed the mark."

Furthermore, it is beyond argument that, on this record, the general level of assessment of Detroit real property has been deliberately maintained at merely 50 percent of market value for many years.[6] Having abrogated the legislative standard for assessment, and having sanctioned adoption by the administrative agency of a method of assessment as the standard, the Opinion disposes of the manifest discrimination arising from the huge disparity between the general level of assessment in Detroit and the level of assessment of Petitioner's property with this language: "Since the taxpayer raised no question of discrimination in regard to the mode of assessment, admitting that the reproduction cost formula was applied to assess similar properties, the remaining question is whether the Tax Commission's valuation was so unreasonable as to amount to fraud."

4. No reported Michigan case supports the doctrine presently propounded by the Court of Appeals. The power of the administrative agency to select methods of appraisal certainly has never been held in Michigan to be power to transform the administrative *method* of valuation into the legal *standard* created by the legislature under the constitutional mandate to establish a uniform rule of taxation.

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[6] See Footnote 3, Page 5, *supra*. The representation by the City Controller is supported by annual audit reports of the City Auditor General. (304a-313a)

The fact that from time to time the Michigan court has approved the use of various methods of valuation, including the reproduction cost method, does not at all mean that the court does not insist that the result of the method —the assessment—conform to the legal standard established by direction of the constitution.

Twenty-Two Charlotte, Inc. v. City of Detroit, 294 Mich. 275, 293 N.W. 647 (1940) is the definitive case on the constitutional point that the assessing officials may not depart from their bounden duty of determining market value, the legislative standard for assessment, even in the case where, as here, the property is singular in character and rarely sold. *Twenty-Two Charlotte* involved an assessment arrived at by the reproduction cost method in the depression year of 1938 against a hotel in downtown Detroit. The taxpayer, disputing the assessment on the fallacious ground that recent purchase of the hotel for a much lesser price established market value, made no attempt to establish true market value of the property or the general level of assessment in Detroit.

Twenty-Two Charlotte states:

> (p. 283) "Where property is singular in character and sales are separated by many years, there is no usual selling price in the sense the expression is used to describe the focus of buyers and sellers of commodities actively exchanged in an open market. Nor did the legislature intend that a single event be conclusive. In the valuation problem the assessing officers had to resolve in the instant case, the test of the 'usual selling price' is merely a guide for determination; *under the circumstances before us the definition provides a standard for a hypothetical or fictitious market. It was the duty of the assessors to consider the factors which motivate buyers and sellers to exchange their interests (Olson v. United States, 292 U.S. 246 [54 Sup. Ct. 704]), and to exercise their judgment in an honest effort to determine at what point the inertia to trade is overcome.*" (Emphasis supplied.)

The Court in *Twenty-Two Charlotte* sums up the constitutional necessity for substantial relation of the assessment to the legislative standard of market value in order to obtain equality in taxation, thus:

> "A generally approved practical scheme of valuation may yet produce fundamentally wrong results under the circumstances of a particular case. *Fargo v. Hart,* 193 U.S. 490 (24 Sup. Ct. 498); *Union Tank Line Co. v. Wright,* 249 U.S. 275 (39 Sup. Ct. 276); *Wallace v. Hines,* 253 U.S. 66 (40 Sup. Ct. 435); *Rowley v. Railway Co., supra* [(293 U.S. 102)]. See also, *Illinois Central R. Co. v. Minnesota,* 309 U.S. 157 (60 Sup. Ct. 419). The reproduction-cost-less-depreciation method of valuation produced a result which clearly transcended reality in the *Tunnel Case* and for this reason the tax was stricken down.
>
> 'If the result was clearly wrong, the method used would not save it.' *Bailey v. Megan,* (C.C.A. 8), 102 Fed. (2d) 651.
>
> There is no such shocking unreality in the case before us." (pp. 285, 286)

(The *Tunnel Case* referred to by the Michigan court is *City of Detroit v. Detroit & Canada Tunnel Co.,* 92 F. 2d 833, (C.C.A. 6) (1937) affirming the District Court (reported as *Parsons v. Detroit & Canada Tunnel Co.,* 15 F. Supp. 986), in invalidating assessment by the reproduction cost method for the years 1932, 1933 and 1934 for ad valorem taxes, the assessed valuation of the property being "on a level of over 400 per cent of its true cash value as arrived at by capitalizing its earning power," when property generally in Detroit, "the market value of which has been established by actual sales, is on a level of approximately 102 per cent of its actual market value." (*Parsons,* p. 994). On the point that the assessment transcended reality, the Court of Appeals observed (p. 836): "In *Adams*

Express Co. v. Ohio State Auditor, 166 U.S. 185, 222, 17 S. Ct. 604, 606, 41 L. Ed. 965, it was said: 'Business men do not pay cash for property in moonshine or dreamland. They buy and pay for that which is of value in its power to produce income, or for purposes of sale.'"

Important confirmation of the legislative intent that the integrity of the standard of cash value as free market value be preserved is obtained from the action of the state legislature immediately following decision in *Helin v. Grosse Pointe Tp.*, 329 Mich. 396, 45 N.W. 2d 338 (1951). In *Helin*, the assessment reached by the same reproduction cost method as in the case at bar was invalidated because the assessmment did not comply with the statutory standard of cash value, a prior sale of the property by the State, after it had acquired a tax title, at a much lesser sum being held controlling. Thereupon, the 1951 Michigan Legislature amended the statute to insert the following clause immediately after the words defining cash value:

> "Any sale or other disposition by the state or any agency or political subdivision thereof heretofore or hereafter made of lands acquired for delinquent taxes or any appraisal made in connection therewith shall not be considered as controlling evidence of true cash value for assessment purposes." (App. B, p. 30)

In Re Appeal of General Motors Corp., City of Livonia v. State Tax Commission, 376 Mich. 373, 137 N.W. 2d 161, (1965), reiterates that uniformity of mode of assessment does not satisfy the Michigan constitutional requirement of uniformity in taxation:

> (p. 378) "Thus all taxable property, real and personal, is placed in one category to be uniformly assessed and taxed.[1]"

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[1] *"A uniform mode of assessment does not necessarily produce a uniform result."* (Emphasis added.)

And further:

> (p. 379) "As a practical matter, unequal assessments must be reduced to the average level of assessment if the taxpayer is to have a remedy."

5. The assessments of Petitioner's property are a perfect example of enslavement of the assessing officials to an approved method of appraisal. Use of that method produced a valuation of $8,144,716 in 1960, but a valuation of $4,968,723 in 1962, a difference of over $3,000,000 in appraised value within two years time. (There was demolition of only about one-half of one per cent of the total floor space, and Petitioner had spent over $520,000 in alterations and improvements in the period between the two Commission valuations.) (See Footnote 4, page 5, *supra.*) The assessing officials had the right to use their method of appraisal. However, by the law of Michigan, the assessing officials had the bounden duty in establishing the assessment, of using their best judgment to determine market value. Judged by the constitutional standard, the assessments in all four years are so manifestly unreasonable as to clearly transcend reality.

In the final analysis, review is not sought of judgment of the assessing officials, exercised within their discretionary power. What is sought to be reviewed is the action of the assessing officials, completely outside of their discretionary powers, of usurping the constitutionally mandated power of the legislature to establish the standard for assessment in Michigan. It is particularly unfortunate that the illegal action of the assessors has been sanctioned by a court through *expressly stated* abrogation of the constitutional standard.

It is respectfully submitted that, if this Court summarily reverses the Court of Appeals or if the writ be granted so that there can be accomplished the ultimate relief of returning these assessments to the Michigan authorities for reassessment in accordance with Michigan constitutional principles, the integrity of Michigan jurisprudence will be preserved.

B. THE COURT OF APPEALS HAS DECIDED A FEDERAL QUESTION IN A WAY IN CONFLICT WITH THE APPLICABLE DECISIONS OF THIS COURT

The Michigan Constitution places all taxable property in one class for ad valorem taxation. *Appeal of General Motors Corp., supra.*

The general level of assessment of all properties in the taxing unit, the City of Detroit, has been for many years at the "rate of approximately 50% of estimated sales of cash value." Maintenance of such a low ratio of assessment of properties to market value is deliberate as a factor in assuring the "financial community" of the financial stability of the city. (A lingering mark of the great depression had been the high general ratio of assessment in Detroit to market value. Cf. *Parsons, supra; Sloman-Polk Co. v. Detroit,* 261 Mich. 689, 247 N.W. 95 (1933).) On the other hand, Petitioner's property has been assessed for four years at many times its market value, in deliberate avoidance of the standard for assessment mandated by the Michigan constitution. It is submitted that this constitutes intentional, persistent and systematic discrimination in violation of the Fourteenth Amendment of the Constitution of the United States.

"It has long been recognized that discrimination between taxpayers, if intentional or so persistent as to be systematic, is a denial of equal protection, whether the discrimination is in the application of different rates to property in the same class or in inequality in its valuation." *Great Northern Ry. Co. v. Weeks,* 297 U.S. 135, 155, Cf. *Iowa-Des Moines Nat. Bank v. Bennett,* 284 U.S. 239, 245; *Cumberland Coal Co. v. Board of Revision,* 284 U.S. 23, 25ff; *Chicago G. W. R. Co. v. Kendall,* 266 U.S. 94, 98, 99; *Sioux City Bridge Co. v. Dakota County,* 260 U.S. 441, 445; *Raymond v. Chicago Union Traction Co.,* 207 U.S. 20, 37.

CONCLUSION

The clear error of law in this case is so fundamental, and its probable effect on Michigan jurisprudence so devastating, that summary reversal by this Court is appropriate.

Respectfully submitted,

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